Supreme Court, U.S.
FILED
JAN 2 1992

(3)

No. 91-870

In The

Supreme Court of the United States

October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT A. GINSBURG
Counsel of Record
for Respondent
Dade County Attorney
Metro-Dade Center, Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
Phone (305) 375-5151

by

LEE KRAFTCHICK
Assistant County Attorney

and

JOHN MCINNIS
Assistant County Attorney

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING CERTIORARI 5

I. CONSTITUTIONAL CLAIMS 6

THE COURT SHOULD NOT ACCEPT CERTIORARI BECAUSE THE LOWER COURT'S DECISION TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF *CROSON* PROVIDES ALL THE RELIEF THE PETITIONER CAN REASONABLY EXPECT. 6

II. TITLE VII CLAIMS 8

A. THIS COURT'S NEED TO CONSIDER THE PETITIONER'S TITLE VII CLAIM MAY BE MOOTED BY THE REMAND OF HIS CONSTITUTIONAL CLAIM 8

B. THIS COURT HAS ALREADY DETERMINED THAT AFFIRMATIVE ACTION CLAIMS UNDER TITLE VII ARE GOVERNED BY A DIFFERENT STANDARD THAN SUCH CLAIMS UNDER THE EQUAL PROTECTION CLAUSE. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) ... 2, 5, 6, 7, 11

Cunico v. Pueblo School District, 917 F.2d 431 (10th Cir. 1990) ... 10

Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989) ... 10

Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) ... 10

Johnson v. Transportation Agency, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) ... 9

Long v. City of Saginaw, 911 F.2d 1192 (6th Cir. 1990) ... 7

Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991) ... 1, 2

S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752 (11th Cir. 1991) ... 7

Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ... 2

Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991) ... 7

Triad Associates, Inc., v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989) ... 7

Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) ... 9

STATUTES

28 U.S.C. § 1254(1) ... 1

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on September 4, 1991, and reported as *Peightal v. Metropolitan Dade County,* 940 F.2d 1394 (11th Cir. 1991).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is generally accurate but leaves out several facts important to an understanding of this dispute. The Respondent, Metropolitan Dade County (the County), offers the following additional information in an effort to clarify the issues raised by the petition.

While Petitioner, Alan Peightal, correctly states that he was denied employment as a County firefighter as a result of the Fire Department's affirmative action plan, he has ignored much of the evidence produced in support of the plan. Most importantly, he has ignored evidence of the Department's history of discrimination against minorities and women.

Contrary to the Petitioner's representation, the County's affirmative action plan for hiring entry level firefighters was not based solely upon a statistical comparison of the Department's makeup in 1983 to the general population in the local

area. Before adopting the plan, the County also considered the Fire Department's 20 year history of hiring, a history that reflects a longstanding underrepresentation of blacks, Hispanics and females. In 1965, the Department employed 121 firefighters, all but one of whom were white males, compared to an available labor force that was 69% white, 15% black, 16% Hispanic and 52% female. Defendant's Exhibit 9; R2 at 109-10. By 1975, the Fire Department had grown to 499 firefighters, 89% of whom were white, 8% black, 3% Hispanic and none female, compared to an available labor force that was 52% white, 16% black, 32% Hispanic and over 50% female. *Id.* By 1983, when the affirmative action plan at issue was implemented, the number of firefighters in the Department had increased to 921, 74.9% of whom were white, 11.8% black, 13.8% Hispanic and only 1.3% female, compared to an available labor market that was 47% white, 17.3% black, 35.8% Hispanic and over 50% female. *Id. Peightal v. Metropolitan Dade County,* 940 F.2d 1394, 1396 (11th Cir. 1991).[1]

---

[1] In a dissenting opinion, Chief Judge Tjoflat questioned the County's use of general population statistics to set its affirmative action goals because such statistics do not reflect the percentage of the population that is actually qualified to be firefighters. The majority opinion found such statistics appropriate because applicants for positions as County firefighters do not need to possess any specialized skills. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, ___, 109 S. Ct. 706, 725, 102 L.Ed.2d 854, ___ (1989); *Teamsters v. United States,* 431 U.S. 324, 337-38, 97 S.Ct. 1843, 1855-56, 52 L.Ed.2d 396 (1977). The appellate court has remanded the matter to the district court for the purpose of, among other things, clarifying the statistical basis for the County's affirmative action plan.

The Petitioner's statement also ignores the efforts the County made to increase the number of minorities and women working at the Fire Department before it decided to begin hiring in accordance with the goals of its affirmative action plan. The Department had a longstanding recruitment program aimed at attracting minorities and females to the Department R2-106; Def. Exh. 1 at 9. The Department established a special recruitment team for the purpose of making presentations at local colleges, high schools, job fairs and career development programs. *Id.* The recruitment program also provided for meetings with local minority and female organizations to inform them of the Department's employment opportunities. *Id.* The Department also conducted special activities aimed at attracting minorities, including a summer youth employment program. *Id.* at 10. A group of the Department's black firefighters, known as the "Progressive Firefighters Association" volunteered to conduct an outreach program to the black community. The Association's activities were included as part of the Department's overall recruitment program. *Id.* at 9.

Despite these efforts, the Department was not able to attract a sufficient number of minority and women applicants to make up for the historical underrepresentation of these groups. In fact, if the Department had not adopted the affirmative action hiring goals contained in the 1983 affirmative action plan, and had instead hired strictly in accordance with ranking on the eligibility list, no blacks, no women and only six Hispanics would have been hired. R1-36-102 n.8; Plaintiff's Exhibit 8.

The Petitioner's statement also ignores the limited purpose of the Department's eligibility list. Although the list ranked candidates on the basis of their score on a

written examination, performance on the test was not the only criterion the Department used in making its hiring decisions. After passing the test, candidates were required to submit to an oral interview, pass a physical capability test and undergo a complete medical examination. The Department's concern at the recruitment level was to insure that all candidates who were offered positions met these basic requirements, not that it hire only those persons who scored highest on the written examination.

The Petitioner's statement also ignores the manner in which the Department's affirmative action goals were actually used. The goals were not fixed, inflexible mandates for the hiring of a set number of blacks, Hispanics or women. The process was designed to ensure that the Department did not hire any unqualified candidates, whether minority, female or otherwise. R2-113. The plan set flexible standards based on a realistic assessment of what the Department could actually attain given the actual number of persons who applied and the openings available. R2-112, 113. If the recruitment process failed to produce a sufficient number of qualified minority or female candidates, the Department remained free to fill any remaining vacancies with qualified nonminority male candidates. R2-113. For example, the Department set a goal of hiring 37 Hispanics but ended up hiring only 28. Deft. Exhs. 7, 8.

Finally, the Petitioner's statement unduly exaggerates the effect of the lower court's actual holding. The Eleventh Circuit did not hold that the County's plan is valid against all challenges, only that it meets the requirements of Title VII. The Eleventh Circuit has remanded the matter for the district court to consider the affirmative

action plan's validity under the Fourteenth Amendment in light of this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Rather than wait for either the district court or the court of appeals to finally decide the validity of the Fire Department's affirmative action plan, the Petitioner has decided to seek this writ of certiorari.

REASONS FOR NOT GRANTING CERTIORARI

The Petitioner has asked the court to accept certiorari for the purpose of deciding whether the Eleventh Circuit properly applied this Court's decision in *Croson* to his claim that the County's affirmative action plan violates the equal protection clause of the Fourteenth Amendment and whether the *Croson* standard applies to challenges of affirmative action plans under Title VII. The Petition must be rejected because the Eleventh Circuit has not yet had an opportunity fully to consider the impact of the *Croson* decision on the County's affirmative action plan and has remanded the matter to the district court for just this purpose. While the lower court has issued a final determination that the County's plan complies with Title VII, that decision will be moot if after remand the Eleventh Circuit ultimately determines that the County's plan does not meet constitutional standards. The procedural posture of this case makes acceptance of certiorari at this time inappropriate.

I.

CONSTITUTIONAL CLAIMS

THE COURT SHOULD NOT ACCEPT CERTIORARI BECAUSE THE LOWER COURT'S DECISION TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF *CROSON* PROVIDES ALL THE RELIEF THE PETITIONER CAN REASONABLY EXPECT.

The County does not disagree with the Petitioner's suggestion that the law concerning affirmative action by public employers is in need of clarification. Unfortunately, this case is not presently in a posture that would allow the Court to clarify the law. This action was filed in November 1986 and tried in January 1988, nearly a year before this Court issued its decision in *Croson*. In recognition of the importance of the *Croson* decision and the intensive factual evaluation upon which affirmative action plans depend, the Eleventh Circuit has remanded this matter to the district court for reconsideration. If the Petitioner is correct in his assertion that the County's affirmative action plan does not meet the requirements of *Croson*, he will have a complete opportunity to present his position to the district court, and should the district court rule against him, to the Eleventh Circuit on appeal. No harm can come to the Petitioner from the Eleventh Circuit's decision to remand this matter for the sole purpose of allowing both the Petitioner and the County to have a complete opportunity to present their positions in light of *Croson*'s requirements.

There is nothing more the Petitioner can legitimately expect to gain from this Court's granting certiorari at this time. Should the Court accept certiorari, the most natural result would be for this Court to do exactly what the

Eleventh Circuit did – remand the matter to the district court for reconsideration in light of *Croson*. In fact, a number of cases tried prior to *Croson* and on appeal after the issuance of that opinion were remanded for precisely that reason. *See, e.g., Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 971 (6th Cir. 1991); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 767 (11th Cir. 1991); *Long v. City of Saginaw*, 911 F.2d 1192, 1202 (6th Cir. 1990); *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 591 (7th Cir. 1989).

As much as the County would like to see a final resolution of this longstanding dispute and to aid in the clarification of the law regarding affirmative action, this case is not presently in a posture to allow such a resolution. As Eleventh Circuit Chief Judge Tjoflat stated in his concurring and dissenting opinion:

> [I]t [is] best that we remand the appellant's equal protection claim to the district court so that it may decide the merits of this claim. On remand, the district court, which previously resolved this case without the benefit of *Croson*, will be able to analyze the relevant facts extensively. In this way, we ensure that appellant's claim receives full and fair adjudication.

940 F.2d at 1411 Because nothing more can be gained from the grant of certiorari than what has already been ordered by the Eleventh Circuit, acceptance of certiorari at this time would be a waste of this Court's valuable resources.

II

TITLE VII CLAIMS

A. THIS COURT'S NEED TO CONSIDER THE PETITIONER'S TITLE VII CLAIM MAY BE MOOTED BY THE REMAND OF HIS CONSTITUTIONAL CLAIM.

By a two to one margin, the Eleventh Circuit concluded that the County's affirmative action plan is valid under Title VII. The dissenting judge would have preferred that the Title VII claim be remanded along with the equal protection claim for reconsideration in light of *Croson*. While a majority of the court chose not to remand the Petitioner's Title VII claim, the remand of the equal protection claim may well dispose of any of the Petitioner's remaining arguments.

As a public employer, the County's affirmative action plan is subject to review both under the equal protection clause and Title VII. While the County certainly welcomes the Eleventh Circuit's decision that its affirmative action plan meets Title VII's requirements, it recognizes that the appellate court's decision does not finally resolve the plan's validity. If, as the Petitioner insists, the plan fails to meet the requirements of the equal protection clause, as outlined in this Court's opinion in *Croson*, the plan will still have to be struck down. If the district court and the Eleventh Circuit ultimately reject the Petitioner's constitutional arguments, he will then have an opportunity to seek certiorari from this Court with a complete record and the benefit of the lower courts' final decisions. The posture of this case may be completely different after the lower courts have had an opportunity to finally resolve the matter. Acceptance of certiorari at this time would be premature.

B. THIS COURT HAS ALREADY DETERMINED THAT AFFIRMATIVE ACTION CLAIMS UNDER TITLE VII ARE GOVERNED BY A DIFFERENT STANDARD THAN SUCH CLAIMS UNDER THE EQUAL PROTECTION CLAUSE.

The Petitioner asks this Court to accept certiorari to review the Eleventh Circuit's conclusion that the County's affirmative action plan meets the requirements of Title VII on the ground that the court applied a different test to his Title VII claim than it did to his equal protection claim. The Petitioner's request is based entirely upon the mistaken assumption that this Court has not drawn any distinction between Title VII and equal protection challenges to public employers' affirmative action plans. In fact, this Court has made clear that Title VII's requirements for affirmative action are not identical to those of the Constitution.

Contrary to the Petitioner's assertion, the issue of whether affirmative action claims should be treated differently under Title VII than under the Constitution is not one of first impression for this Court. In fact, this Court has specifically rejected the argument that public employers' affirmative action plans are governed by the same standards under Title VII as under the Constitution. In *Johnson v. Transportation Agency,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), the Court stated:

> The dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore shall be governed by *Wygant* [*v. Jackson Board of Education,*

> 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)]. . . . While public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, 'Congress expressly indicated the intent that the same Title VII principles be implied to governmental and private employers alike.' *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14, 97 S.Ct. 2720, 2728 n.14, 53 L.Ed.2d 786 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

Id. at n.6. *See, e.g., Cunico v. Pueblo School District*, 917 F.2d 431, 437 (10th Cir. 1990) (Relying upon Johnson, the court stated that "the level of proof necessary to justify the consideration of race in an employer's hiring practices . . . differs depending on whether the challenge invokes the equal protection clause or Title VII."); *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989). As Chief Judge Tjoflat stated in this case:

> Were we writing on a clean slate, I might agree with this approach for analyzing Title VII claims involving the affirmative action plans of public employers. The Supreme Court, however, explicitly has rejected the argument that 'the obligations of a public employer under Title VII must be identical to its obligation under the Constitution.' Instead, the Court has held that

> Title VII claims are subject to a different legal standard than equal protection claims.

940 F.2d 1394, 1412 at n.2 (citations omitted).

CONCLUSION

The County is no less interested in seeing this case finally resolved than the Petitioner. The procedural posture of this case, however, makes acceptance of certiorari inappropriate at this time. The matter has been remanded for additional factual analysis in light of this Court's decision in *Croson*. The remand cannot harm the Petitioner in any fashion, but acceptance of certiorari at this time will preclude the parties from fully presenting their respective positions. The County, therefore, respectfully urges the Court to deny certiorari.

Respectfully submitted,
ROBERT A. GINSBURG

Dade County Attorney
Counsel of Record
for Respondent
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By: LEE KRAFTCHICK
Assistant County Attorney

and

JOHN MCINNIS
Assistant County Attorney